GOING ROGUE: ATTORNEY-RELATORS

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I. INTRODUCTION

In the fight against fraud, no tool is more valuable to the federal government than the False Claims Act (“FCA”).¹ Last year, the Civil Division for the Office of the Attorney General recovered $3.5 billion dollars in FCA recoveries.² Of the $3.5 billion dollars in recovered funds, the Civil Division was able to recover $1.9 billion dollars from federal healthcare programs and another $1.9 billion dollars from fraud related to government contracts.³ These recoveries are important given the rampant degree at which fraud occurs every year.

The Civil Division’s success in protecting the public coffers cannot solely be attributed to the dedicated attorneys serving in the Office of the United States Attorn ey General. Under the FCA, a private citizen is able to file a “qui tam suit,” which allows a private citizen, known as a “relator,” to bring a civil action against defrauders on behalf of the federal government.⁴ In successful qui tam suits, the relator is eligible to receive a portion of the money recovered.⁵ Private citizens play a large part in the recovery process as well.⁶ These rewards are more than a mere pittance. Last year, relators received roughly 19.7 percent of the $2.9 billion dollars in fraudulent payments they helped the federal government collect, representing $597 million dollars in rewards.⁷ Last year also marked the fifth year relators filed more than six hundred qui tam suits on behalf of the federal government.⁸

Currently, the FCA only excludes certain categories of individuals from serving as relators.⁹ Curiously enough, attorneys are not one of them. This Note will explore the case law and ethical rules and dilemmas associated with attorney-relators. First, this

² Id.
³ Id.
⁶ DEP’T OF JUSTICE, supra note 4. In 2015, 423 lawsuits were filed under the qui tam provision of the False Claims Act. DEP’T OF JUSTICE, supra note 4.
⁷ DEP’T OF JUSTICE, supra note 4.
⁸ DEP’T OF JUSTICE, supra note 4.
Note will discuss the statutory background of the False Claims Act. Second, this Note will examine federal and state court decisions examining whether attorneys can properly serve as relators in qui tam suits against their former clients. Third, this Note will include an overview of the ethical and evidentiary problems attorneys face when bringing a qui tam suit against a former client and how these requirements frustrate the government’s goal of rooting out fraud through the FCA. Finally, this Note will conclude with a discussion of how the American Bar Association’s (“ABA”) loyal disclosure rules strike a healthy balance between permitting attorneys to expose fraud while also preserving client relationships.

II. FALSE CLAIMS ACT STATUTORY BACKGROUND

A. The Beginning

The FCA prohibits individuals from making fraudulent claims for payment against the government. Private citizens are authorized to bring qui tam actions on behalf of the United States government against defrauders. These suits derive their name from the Latin phrase qui tam pro domino rege quam pro si ipso in hac parte sequitur, meaning “[w]ho sues on behalf of the king as well as for himself.” The FCA originated during the Civil War era. At the height of fighting between the Union and Confederate soldiers, the government faced significant problems: Union soldiers received barrels of gunpowder that contained nothing but sawdust, shipments of uniforms weaved from rags fell to pieces when they came in contact with water, and contractors billed the Union for the same mules and horses time and time again. The persistent abuse led Senator Henry Wilson of Massachusetts to introduce the first version of the FCA to the Senate on January 16, 1863.
Senator Wilson decried the “bands of conspirators,” who “plundered the treasury day after day.”17 Although the halls of the Senate had “rung with denunciations of the frauds of contractors upon the United States,” Senator Wilson explained the government had no adequate law with which to punish these defrauders.18 While explaining the structure of the FCA, Senator Howard quipped, “[i]n short, sir, I have based [the provisions of the FCA] upon the old–fashioned idea of holding out a temptation, and ‘setting a rogue to catch a rogue’ which is the safest and most expeditious way I have ever discovered of bringing a rogue to justice.”19

President Lincoln signed the FCA into law on March 2, 1863.20 The statute permitted individuals to bring an action on behalf of the United States government or themselves, against any person in the service, or called into the service, of the United States government who knowingly submitted false claims for payment.21 Defrauders were forced to pay double the amount of damages sustained by the United States as a result of the fraud, as well as a two–thousand dollar penalty per false claim.22 As an incentive for bringing these suits, the individual bringing the qui tam action was entitled to half of the government’s recovery.23

B. Parasitic Problems

The FCA remained unchanged until 1943 when a rash of “parasitic lawsuits” filed by abusers of the statute’s qui tam provision spurred Congress into action.24 The abusers would hide out in federal courthouses in hopes of stumbling across an indictment of a government contractor for false claims.25 Upon hearing the indictment, the individual would file a qui tam action, allowing some relators to collect rewards for wrongdoing they overheard another reporting.26

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17 Id. at 956.
18 Id.
19 Id.
21 Id.
22 Id.
23 Id.
24 Helmer, supra note 14, at 1267–68.
26 Helmer, supra note 14, at 1267–68.
In response to abuse of the qui tam provision, the 1943 amendments to the FCA significantly changed the Civil War era statute.\textsuperscript{27} To combat the filing of the redundant lawsuits described above, relators were required to turn over all evidence to the government at the time the action was filed.\textsuperscript{28} Additionally, the revisions required courts to dismiss qui tam suits if the government possessed knowledge of the fraud when the action was filed.\textsuperscript{29} The government would then have sixty days to determine whether or not it would bring the claim against the accused.\textsuperscript{30}

The 1940s amendments also significantly changed the reward structure of the FCA. Congress reduced the amount of money an individual could receive as a bounty for bringing the action. In cases where the government chose to pursue the case, the maximum award was capped at ten percent.\textsuperscript{31} If the government decided not to pursue the case, the individual was entitled to receive no more than twenty-five percent of the award.\textsuperscript{32} The revisions did not guarantee relators a reward, however; Congress gave the ability to award damages to individuals solely within the discretion of the court.\textsuperscript{33} A judge could award nothing if she deemed it appropriate.\textsuperscript{34} These changes eliminated most qui tam suits for a number of years.\textsuperscript{35}

C. The FCA Reborn

Congress took action to strengthen the FCA after a second wave of fraudulent claims for military spending raided the public coffers in the early 1980s.\textsuperscript{36} Organizations billed the government absurd amounts of money for relatively inexpensive items.\textsuperscript{37} On October 27, 1986, President Reagan signed into the law the second set of amendments to the FCA.\textsuperscript{38}

\begin{itemize}
  \item \textsuperscript{27} 89 Cong. Rec. 7570, 7571 (1943).
  \item \textsuperscript{28} 31 U.S.C. § 3730(b)(2) (1943).
  \item \textsuperscript{29} \textit{Id.} § 3730(d)(4).
  \item \textsuperscript{30} \textit{Id.}
  \item \textsuperscript{31} \textit{Id.} § 3730.
  \item \textsuperscript{32} \textit{Id.} § 3730(d)(1).
  \item \textsuperscript{33} \textit{Id.} § 3730(d)(3).
  \item \textsuperscript{34} 31 U.S.C. § 3730(d)(3) (1943).
  \item Helmer, \textit{supra} note 14, at 1271.
  \item Helmer, \textit{supra} note 14, at 1271.
  \item Helmer, \textit{supra} note 14, at 1271–72.
\end{itemize}
The 1986 amendments adjusted the proportion of the recovery a relator would receive.\(^{39}\) Successful relators were listed to receive between fifteen and twenty-five percent of the recovery if the government decided to intervene, and between twenty-five to thirty percent of the recovery if the individual pursued the case on his own.\(^{40}\) Regardless of whether the government chose to intervene, relators retained the right to participate in the litigation.\(^{41}\) Congress increased the ante for the federal government from double to treble damages.\(^{42}\) The penalties associated with each false claim were similarly increased to between five thousand and ten thousand dollars.\(^{43}\) A successful relator could also recover legal expenses from the accused.\(^{44}\)

Furthermore, Congress enacted several protections to shield employee relators from retaliation claims.\(^{45}\) The FCA provides that employees, contractors and agents who are “discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against” are entitled to all relief necessary to make them whole if the aforementioned actions were in response to the individual’s lawful acts done in adherence to the FCA.\(^{46}\) The available relief could include:

\[
\ldots \text{reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, [two] times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.}\]

\(^{47}\)

The 1986 amendments also brought substantive changes to the law. Congress clarified the necessary degree of intent required to establish a violation under the FCA.\(^{48}\) The amendments also enunciated the relator’s burden of proof for civil FCA actions.\(^{49}\)

\(^{40}\) Id.
\(^{41}\) Id.
\(^{42}\) Id. § 3729(1)(G).
\(^{43}\) Id.
\(^{44}\) Id. § 3730(c)(1).
\(^{46}\) Id. § 3730(h)(1).
\(^{47}\) Id. § 3730(h)(2).
\(^{48}\) Id. § 3729(b).
\(^{49}\) Id. § 3731(c).
Congress attempted to remedy its de facto elimination of qui tam suits by addressing the controversial “government knowledge” defense from the 1943 amendments. The solution Congress settled upon was the “public disclosure” exception. Under this exception, a relator is barred from bringing a qui tam suit based upon a public disclosure of the alleged wrongdoing by the media or a criminal, administrative, or civil hearing. If, however, the relator was the “original source” of the information and possessed direct and independent knowledge of the alleged wrongdoing and voluntarily provided the government with the information before filing a qui tam action, the relator was permitted to pursue the claim.

D. Congressional Clarification

In response to decades of court decisions interpreting the language of the 1986 amendments, Congress enacted the most recent substantive changes to the FCA through a series of amendments spread across three statutes: the Fraud Enforcement and Recovery Act (“FERA”), Patient and Affordable Care Act (“ACA”), and the Dodd–Frank Wall Street Reform Act (“Dodd–Frank”). Congress was concerned that judicially imposed qualifications and limitations “undermined” the effectiveness of the FCA. Court decisions imposing these limitations allowed “subcontractors and non-governmental entities [to] escape[] responsibility for proven frauds.”

FERA made significant changes to the FCA, including rejecting the intent requirement created by the Supreme Court in Allison–Engine v. United States ex rel. Sanders. In Allison–Engine, former employees of a subcontractor filed a qui tam suit alleging the subcontractor submitted invoices to two shipyards falsely certifying the subcontractor had constructed a set of generators. The

51 Id.
52 Id.
53 Id. § 3730(e)(4).
58 Allison-Engine, 553 U.S. at 662.
Supreme Court held that a subcontractor was not liable under the FCA because claims for reimbursement were only submitted to the general contractor and the shipyards, not the federal government.\(^{59}\) In the Court’s view, relators must prove defrauders intended for their false statements to be material to the government’s decision to pay or approve a false claim.\(^{60}\) Subcontractors around the country began using the Allison–Engine decision to have FCA claims from relators dismissed, allowing numerous frauds to be carried out upon federal programs typically protected by the FCA.\(^{61}\)

Congress noted that such a holding was not only inconsistent with the legislative intent of the FCA, but also created a new defense for subcontractors.\(^{62}\) Dissatisfied with the Supreme Court’s holding, Congress amended the definition of “claim” to include a request or demand for money or property regardless of “whether or not the United States has title to the money or property.”\(^{63}\)

The FERA amendments also expanded FCA liability to include any person who makes or uses a false statement material to a false claim.\(^{64}\) Additionally, the protections originally only available to employees were expanded to include contractors, agents, or associated others.\(^{65}\) Congress further stipulated that complaints proffered by the federal government were to relate back to the original relator’s filing date if the Government’s cause of action arose out of the conduct or transaction of the prior relator’s complaint.\(^{66}\) Changes were also made to the seal provision of the FCA.\(^{67}\)

The amendments to the FCA made by the ACA targeted what Congress believed were misinterpretations of the public disclosure bar.\(^{68}\) In Graham County Soil & Water Conservation District v. United States ex rel. Wilson, the Supreme Court extended the public disclosure exception to include not only information obtained from federal administrative hearings, audits, or investigations, but also to state and local information sources.\(^{69}\) Congress disagreed with the

\(^{59}\) *Id.* at 671–72.

\(^{60}\) *Id.* at 665.


\(^{62}\) *Id.*

\(^{63}\) *Id.* at 19.


\(^{65}\) *Id.* § 3730(h)(1).

\(^{66}\) *Id.* § 3731(c).

\(^{67}\) *Id.* § 3732(c).


\(^{69}\) Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 559
Supreme Court’s interpretation of the public disclosure exception, and explained that only three sources of public information could bar a qui tam suit from being tried: a federal hearing, a federal report, or the news media. The government also retained the ability to waive the dismissal of claims based upon the three types of public disclosure.

The changes incorporated in Dodd–Frank pertained to the appropriate statute of limitations for retaliation suits brought by whistleblowers. The Supreme Court previously ruled the appropriate statute of limitations was to be determined by consulting “a comparable statute in the state in which the retaliation had occurred.” Congress rejected this interpretation of the statute, and instead stated the appropriate statute of limitations for all retaliation claims brought by whistleblowers would be three years after the alleged retaliation occurred.

From its very beginning, the FCA has been a powerful tool in the fight against fraud. Congress unequivocally reversed the limitations placed upon the provisions of the FCA in the 1940s by the urging of the Department of Justice with its full throttled support of the law in the 1980s. The most recent revisions to the law, drawing bipartisan support, have shown that Congress believes the FCA is a valuable and powerful tool for the federal government that courts should not limit. Congress has decided to expand liability, increase the number of scenarios in which individuals can bring claims and also increase the award for potential relators as well. The revisions have shown that Congress is not only comfortable with, but fully supports the expansive private-enforcement scheme created to combat fraud.

III. CASES OF ATTORNEY-RELATORS

In United States ex rel. Doe v. X Corp., the District Court of the Eastern District of Virginia decided whether an attorney’s participation in a qui tam action against the attorney’s former employer violated state ethical rules of conduct. The Doe court also squarely addressed the issue of whether it was proper for

71 Id. at § 3730(e)(4)(A).
72 Helmer, supra note 14, at 1280.
73 Helmer, supra note 14, at 1280.
attorneys to serve as relators in qui tam suits brought against former clients.76 John Doe, in-house counsel for X Corp., became concerned that X Corp. might be violating multiple provisions of the Federal Acquisition Regulations.77 After reporting his suspicions to X Corp., Doe began a thorough investigation of the perceived wrongdoing.78

X Corp. abruptly brought Doe’s investigation to a halt, however, by transferring Doe to another office and shifting the primary control of the inquiry to another in-house counsel.79 Despite being moved, Doe continued his investigation into the matter.80 After a year, Doe expressed his dissatisfaction to other members of the X Corp. legal team again, reiterating the potential violations of the regulation that he believed X Corp. was perpetrating as well as expressing dissatisfaction over the speed in which the investigation was being completed.81 Three months later, X Corp. terminated Doe.82 In an effort to correct the perceived wrongdoing of his former employer, Doe took approximately 4,300 copies of documents belonging to X Corp. that he believed supported his allegations of fraudulent activity and filed a qui tam suit under the FCA.83

The qui tam suit involved a number of trials.84 Eventually, X Corp. reached a settlement with the government to clear the corporation of liability under the FCA.85 However, Doe was not satisfied. He demanded a reward as a relator as well as attorney’s fees.86 X Corp. balked at the demand, arguing that Doe’s role as X Corp.’s former in-house counsel barred him from properly serving as a relator in the FCA claim.87 X Corp. filed a motion to dismiss.

76 Id. at 1506–08.
77 Id. at 1504.
78 Id.
79 Id.
80 Id.
81 Doe III, 862 F. Supp. at 1504.
82 Id.
83 Id.
86 Id. at 1505–06.
87 Id.
Doe’s claims for an award and attorney’s fees, or, in the alternative, summary judgment as a matter of law on the issue.\textsuperscript{88}

The Doe court reviewed the FCA, focusing on the provisions which expressly barred relators from bringing certain claims.\textsuperscript{89} Claims brought by attorney-relators were conspicuously absent from this list.\textsuperscript{90} In the absence of a statutory provision to the contrary, the District Court held attorneys could not be prohibited from serving as a relator in an action against a former client.\textsuperscript{91}

X Corp. insisted that Congress did not intend for a counsel to serve as a relator in qui tam suits filed against former clients because doing so would destroy the sacred relationship between attorneys and their clients.\textsuperscript{92} Furthermore, allowing attorneys to serve as relators would incentivize those individuals to “flout their ethical obligations” and use the client’s confidential information for their own personal gain.\textsuperscript{93} Clients would therefore be hesitant to seek help from their attorneys, as any disclosure made by the client could potentially serve as the fuel for a qui tam suit under the FCA.\textsuperscript{94}

The Doe court was unimpressed by the argument, citing several reasons for disagreeing with X Corp.’s analysis.\textsuperscript{95} First, X Corp.’s concerns rang hollow; nothing in the FCA preempted any state ethical obligations that an attorney owed to their client.\textsuperscript{96} Second, the FCA did not require attorneys to file qui tam suits.\textsuperscript{97} The statute merely made qui tam suits permissive.\textsuperscript{98} Third, the court argued the FCA does not shield an attorney from liability from state law claims.\textsuperscript{99} Fourth, injunctive or declaratory relief could be made available to clients who foresaw an attorney revealing their confidential information.\textsuperscript{100}

\textsuperscript{88} Id.
\textsuperscript{89} Doe III, 862 F. Supp. at 1505.
\textsuperscript{90} Id.
\textsuperscript{91} Doe III, 862 F. Supp. at 1506.
\textsuperscript{92} Id. at 1507.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Doe III, 862 F. Supp. at 1507.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
Putting the aforementioned arguments aside, the court explained that Congress simply had not included attorneys in the list of individuals prohibited from serving as a relator. 101 Such a prohibition was for the legislature to decide, not the courts. 102 Including attorneys as relators served the legislative intent of the FCA “to enhance the Government’s ability to recover losses sustained as a result of fraud against the Government.” 103

In Bury v. Community Hospitals of Central California, the former general counsel for a hospital filed a qui tam suit under the California state False Claims Act against his former employer and the County of Fresno. 104 Bury alleged the County was improperly receiving funding for providing medical services to the indigent because his former employer had assumed sole responsibility for those duties under a contract and lease arrangement with the County. 105 The hospital moved to have the case dismissed, arguing that Bury violated ethical and statutory duties of confidentiality by pursuing his qui tam suit against a former client. 106

Referencing the District Court’s decision in Doe III, the Court of Appeal of California noted Bury’s status as a former general counsel did not preclude the qui tam suit. 107 However, the court held Bury’s duty of loyalty and confidentiality to his former client, the hospital, precluded his qui tam suit. 108 The court explained an attorney and client are in a fiduciary relationship “of the highest character.” 109 It is the duty of the attorney to “to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” 110 Bury was under an obligation to protect his client “in every possible way.”

The District Court of the Eastern District of Virginia engaged in a balancing of federal and state interests similar to the Second Circuit Court of Appeals’ approach in United States ex rel. Fair Lab.

101 Doe III, 862 F. Supp. at 1508.
102 Id.
105 Id. at *4.
106 Id. at *4-5.
107 Id. at *7.
108 Id. at *10-12.
109 Id. at *10 (citing Zador Corp. v. Kwan, 31 Cal. App. 4th 1285, 1293 (1995)).
111 Id. at *11.
Practices Assocs. v. Quest Diagnostics, Inc. Unilab Corporation, a wholly-owned subsidiary of Quest Diagnostics, Inc. (“Quest”), was sued under the False Claims Act by a partnership created by three former executives. One of the executives was Mark Bibi, the former general counsel of Unilab. The partnership alleged Unilab and Quest violated the Federal Health Care Anti-Kickback Act, 42 U.S.C. § 1320a–7b(b) (“AKS”) by offering medical device testing services to clients at low rates in order to receive a greater number of referrals for Medicaid and Medicare patients.

In 1996, Bibi informed executives at Unilab that this “pull through scheme” was a potential violation of the AKS. In response, Unilab raised their prices, resulting in a loss of business to competitors. In 1999, Unilab hired new executives that lowered the price of the medical device testing services to their previous rates. Again, Bibi expressed his concern that the pull through scheme was likely illegal. This time, however, Unilab executives refused to consult with Bibi on any compliance issues and eventually replaced him as general counsel.

Prior to joining the qui tam suit, Bibi consulted the New York Code of Professional Responsibility and the American Bar Association Model Rules of Professional Conduct to determine if his participation in the qui tam suit would violate any ethical obligations. Bibi did not believe his participation in the FCA case would be problematic because Unilab continued to defraud the United States government. In the ensuing litigation, Quest and Unilab disagreed with Bibi’s interpretation of the rules, arguing they would be unduly prejudiced if the plaintiffs would be allowed to proceed using confidential information Bibi had gained through his relationship with the defendants.

112 United States v. Quest Diagnostics, Inc., 734 F.3d 154, 157 (2d Cir. 2013).
114 Id. at *6.
115 Id. at *2.
116 Id. at *9-10.
117 Id. at *10.
118 Id.
120 Id. at *12-13.
121 Id. at *15-16.
122 Id. at *16.
123 Id. at *19.
The United States District Court for the Southern District of New York explained that when state ethical rules clash with federal interests, federal courts must interpret the rule in such a way as to balance the varying interests between federal and state law. The court noted that nothing in the FCA shielded a relator from liability from state statutes. The court found that Bibi’s disclosure of Quest’s confidential information did not meet the requirements of the New York Code of Professional Responsibility’s “ongoing crime” exception. The information that Bibi disclosed was excessive because he not only disclosed confidential information to the other members of FLPA, but he also disclosed information to the government and another relator in a California qui tam suit. The court dismissed the complaint and prohibited Bibi and FLPA, including any of its members, from bringing a suit against the defendants based upon the facts of the case.

On appeal, the United States Court of Appeals for the Second Circuit affirmed the dismissal. Much like the district court, the Second Circuit found no language in the FCA that preempted any state statutes; Bibi was still liable for any violation of state rules. The appellate court recognized, however, that state rules could run “antithetical to federal interests,” and so the judges proceeded to decide the appeal by balancing the relevant state and federal interests.

Although Bibi could have reasonably believed the defendants were going to commit a crime via the pull through scheme, the Second Circuit believed Bibi’s disclosure of Quest’s confidences was beyond what was necessary to prevent the commission of a crime within the meaning of New York Code of Professional Responsibility DR 4–101. The rule prohibits attorneys from revealing confidences or secrets of clients, using confidences or secrets of clients to the disadvantage of clients, and using

124 Id. at *20–21 (citing Grievance Comm. v. Simels, 48 F.3d 640, 646 (2d Cir. 1995)).
126 Id. at *38.
127 Id.
128 Id.
129 United States v. Quest Diagnostics, Inc., 734 F.3d 154, 158 (2d Cir. 2013).
130 Id. at 165.
131 Id. at 163.
132 Id. at 164–65.
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confidences or secrets of clients to the advantage of a third party, absent consent.133

Attorneys are permitted to make a disclosure, however, if they reveal both “the intention of a client to commit a crime and the information necessary to prevent the crime.”134 The court explained that New York Rule 1.6(b) effectively balanced the federal interests at stake by permitting attorneys to disclose information “necessary” to prevent the commission of a crime.135 Bibi had many alternatives available to him besides disclosing information to the extent at which he did.136 The Second Circuit held that his conduct was not protected and dismissed the suit against the defendants to prevent any undue prejudice to Unilab or Quest Diagnostics.137

IV. EVIDENTIARY OBSTACLES & ETHICAL RULES

The Quest and Doe courts were quite adamant in their assertions that attorneys were not categorically barred from serving as relators in qui tam actions. Both courts noted Congress intended the FCA to have a broad reach. The classes of individuals who could potentially serve as relators were broad in order to assist the government in its fight against fraud. Although nothing bars attorneys from serving as relators, ethical and evidentiary rules make it exceedingly difficult for attorney-relators to bring successful qui tam claims.138

A. The Attorney-Client Privilege

The attorney-client privilege exists in every American jurisdiction in some form, either by statute, evidence code, or common law.139 The privilege protects the communications that transpire between an attorney and a client when the client is obtaining legal advice.140 A form of the attorney-client privilege also exists between a corporation’s in-house counsel and corporate

134 Id.
135 Id.; Quest, 734 F.3d at 164.
136 Quest, 734 F.3d at 164–65.
137 Id. at 167-68.
140 Model Rules of Prof’l Conduct r. 1.6 cmt. 1 (Am. Bar Ass’n 2014).
representatives.141 In essence, the privilege gives clients and attorneys the right to not divulge what they communicate to one another.142 Privilege is created when a communication is made between privileged persons in confidence for the purpose of obtaining or providing legal services to the client.143 The protection continues so long as the confidence is maintained.144

To invoke the attorney-client privilege as a shield an individual must first show that a “communication” took place, defined as “any expression through which a privileged person . . . undertakes to convey information to another privileged person and any document or other record revealing such an expression.”145 The communication may be a face-to-face conversation, telephone call, memorandum, e-mail, text message, or any other mode of exchanging information.146 Additionally, the communication need not even succeed to receive protection.147 The privilege only prevents disclosure of the communication between the attorney and client; it does not, however, protect the disclosure of the underlying facts of the conversation.148

Second, the communication must occur between privileged persons.149 Privileged persons include “the client [], the client’s lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation.”150 Whether the client is currently represented by an attorney or is a prospective client does not matter; the privilege will protect communications from either type of client.151 The protection does not extend to non-privileged persons, however.152 Thus, any communication between a privileged person and a non-privileged individual falls outside the purview of the privilege.153

141 Restatement (Third) of Law Governing Lawyers § 78 (Am. Law Inst. 2000).
142 Id. § 68 cmt. d.
143 Id. § 68.
144 Id. § 79.
146 Id. § 69 cmt. b.
147 Id. § 69 cmt. c.
149 Id. § 70.
150 Id.
151 Id. § 70 cmt. c.
152 Restatement (Third) of Law Governing Lawyers § 70 cmt. b (Am. Law Inst. 2000).
153 Id.
With regard to the confidence requirement, a client must reasonably believe that the communication is confidential before they may assert privilege over the communication.\footnote{Id. § 70 cmt. f.} However, the Restatement notes that a client’s intention is not “determinative.”\footnote{Id. § 70 cmt. b.} For example, a client may not be found to have a reasonable belief a communication was confidential if the communication was made in a public place.\footnote{Id.} Additionally, the presence of a third party can destroy the privilege whether or not the client intended for the communication to be confidential.\footnote{Id.}

The final element an individual must show to claim the protection of the privilege is that the communication was for the purpose of “obtaining or providing legal services.”\footnote{RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 72 (AM. LAW INST. 2000).} The standard is met if a communication is made to either an attorney or a person whom the prospective client reasonably believes is an attorney is consulted for the purpose of obtaining legal assistance.\footnote{Id. $72 cmt. b (AM. LAW INST. 2000).} The phrase “legal assistance” includes legal counseling, but also includes “document preparation, litigation services, or any other assistance customarily performed by lawyers in their professional capacity.”\footnote{Id. § 79.}

Once obtained, the attorney-client privilege may be waived in few circumstances. Clients can waive the privilege themselves by divulging the privileged information voluntarily to a non–privileged person.\footnote{Id. § 80.} Clients may also waive the privilege if they put the privileged communication into issue in a legal matter, such as a suit for legal malpractice.\footnote{Id. $78 cmt. b.} An attorney may waive the privilege if expressly authorized by a client, if impliedly authorized by a client, or if the client relates information to a third party to the effect that the attorney may waive the privilege.\footnote{Id.} Attorneys may also waive the privilege by failing to invoke it or to comply with a court order.\footnote{Id.}
The maxim relies upon the reasoning that accurate and just legal advice depends upon the ability of the client to disclose information to their attorney without fear of having their information disclosed. Without the fear of disclosure, clients communicate freely with their attorneys, which "encourages observance of the law and aids in the administration of justice." By affording the client the protection of the attorney–client privilege, a client is more likely to disclose all of the facts in a given circumstance, allowing the attorney to comment and advise the client comprehensively on their legal obligations and how a client may best comply with the law.

Bibi’s comments that the pull–through scheme potentially exposed Quest to liability under various federal laws could potentially be considered privileged communications. Quest could have raised the attorney-client privilege as a shield, barring Bibi from disclosing information he communicated to Quest or information communicated to Bibi from Quest in connection with Bibi’s legal services. Thinking about attorney-relators more generally, the attorney-client privilege may in fact preclude some evidence from being brought forward, perhaps a warning from an attorney to a client that a certain action could potentially lead to fraud. The underlying facts, however, would be most important to any qui tam suit, and these facts lie outside the protection of the privilege.

B. The Duty of Confidentiality

It is important to note that the duty of confidentiality cited by the Quest court is distinct from the attorney-client privilege. The Second Circuit decided Quest on Bibi’s failure to protect Quest’s confidences, which violated the professional duty of confidentiality Bibi owed his client. The protection of client-confidentiality afforded by Rule 1.6 is much broader than the protection of the attorney-client privilege. In contrast to the privilege, Rule 1.6 is applicable in situations other than when evidence is sought from an

165 Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.").
168 MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS’N 2002).
attorney under compulsion of law. The rule prohibits an attorney from making a disclosure of client confidences unless the disclosure is authorized by law or the professional rules. The American Bar Association’s guidelines for confidentiality, Model Rule 1.6(a), states a “lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”

Client confidentiality covers both information related to the representation of a client and any information that could “reasonably lead to the discovery” of information of the client. Model Rule 1.6 also shields any personal information relating to the client that the client would not want generally known. Information taken from interviews, documents, photographs or other sources also fall under the umbrella of confidentiality. Lastly, information about the client need not be gained during the course of the representation in order to trigger the duty; any information the attorney gains concerning a client before the representation begins or after the representation is terminated is protected by the rule.

Model Rule 1.6 also contains provisions detailing when an attorney may permissibly reveal client confidences. Rule 1.6(b) states a “lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary” to accomplish one of seven possible outcomes. Two exceptions, Rule 1.6(b)(2) and Rule 1.6(b)(3), are most relevant to the discussion of the FCA.

With regard to Rule 1.6(b)(2), the rules state an attorney may reveal confidential client information when she reasonably believes it is necessary to “prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of

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169 Id.
170 See generally MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2002).
171 Id. r. 1.6(a).
172 Id. r. 1.6 cmt. 4.
173 Id. r. 1.6 cmt. 2.
174 Id. r. 1.6 cmt. 3.
175 Id. r. 1.6 cmt. 20.
176 MODEL RULES OF PROF’L CONDUCT r. 1.6(b) (AM. BAR ASS’N 2002).
177 Id.
which the client has used or is using the lawyer’s services.” Rule 1.6(b)(2) is a forward-looking rule; here, the drafters of the Model Rules were concerned with future frauds that would be committed. Attorneys may only disclose information when they are reasonably certain a substantial injury will result. Even if they are reasonably certain, Rule 1.6(b)(2) further limits the attorney to disclosing information only when the client has used the attorney’s services to further the fraud.

In contrast, Rule 1.6(b)(3) contemplates fraud that a client has already committed. Rule 1.6(b)(3) states an attorney may reveal confidential client information when she reasonably believes the revelation will “prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”

Regardless of whether the fraud in question is a past or future fraud, the disclosure exception highlights three requirements that must be met before a lawyer may disclose confidential information. First, the lawyer must be reasonably certain the client’s actions will result in substantial financial injury or substantial injury to the property of another person. Second, the client must actually use the lawyer’s services to further the fraud. Third, the disclosure is only permitted to prevent a fraud from being committed or to prevent, rectify, or mitigate the harm resulting from a previous fraud.

C. Former Client Confidences

An attorney’s duty to maintain client confidences does not terminate at the end of the relationship. Model Rule 1.9(a) provides that an attorney who has represented a client in a matter shall not thereafter represent another individual in a “substantially related matter” in which the individual’s interests are materially

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178 Id. r. 1.6(b)(2).
179 Id.
180 Id.
181 See generally Model Rules of Prof’l Conduct r. 1.6(b)(3) (AM. BAR ASS’N 2002).
182 Id.
183 Id. r. 1.6(b)(2) & (3).
184 Id.
185 Id.
186 Model Rules of Prof’l Conduct r. 1.9 (AM. BAR ASS’N 2002).
adverse to the former client’s interests.\textsuperscript{187} Matters are “substantially related” if they involve the same transaction or dispute.\textsuperscript{188} Furthermore, matters may be considered “substantially related” if there is a “substantial risk” that a client’s position in a subsequent matter would be materially advanced because of confidential factual information as would normally have been obtained in the prior representation.\textsuperscript{189} This prohibition can be waived if the client gives informed consent, confirmed in writing.\textsuperscript{190}

Additionally, Rule 1.9(c) provides additional proscriptions regarding the use of confidential information obtained from former clients.\textsuperscript{191} Attorneys are prohibited from using information gained during a representation to the disadvantage of a former client.\textsuperscript{192} The rule provides two exceptions. First, if the information is generally known, the attorney may use the confidential information.\textsuperscript{193} Second, if the attorney would otherwise be permitted by the Model Rules to use the information, the attorney is permitted to use the information as well.\textsuperscript{194} Additionally, Rule 1.9(c)(2) prohibits an attorney from revealing information related to the representation of a former client, except as would otherwise be required or permitted by the Model Rules with respect to a client.\textsuperscript{195}

\textbf{D. Pleading Problems}

Qui tam suits implicate fraud, so any complaint offered by a relator must be plead with particularity.\textsuperscript{196} Relators need to establish the “who, what, when, where and how” of the fraudulent schemes: courts have requested information such as the dates in which the fraudulent claims were filed, the names of individuals who filed the fraudulent claims, the amount of money charged to the government, and a description of the goods and services that were billed in order for relators to keep their false claim filings

\begin{footnotes}
\item[187] Id. r. 1.9(a).
\item[188] Id. r. 1.9 cmt. 3.
\item[189] Id.
\item[190] Id.
\item[191] Id. r. 1.9(c).
\item[192] \textsc{Model Rules of Prof’l Conduct r. 1.9(c)(1) (Am. Bar Ass’n 2002)}.
\item[193] Id.
\item[194] Id.
\item[195] Id. r. 1.9(c)(2).
\end{footnotes}
General outlines of fraudulent schemes, even when provided in great detail, are by themselves insufficient to satisfy the pleading requirements of Rule 9(b). The case for relators is not hopeless, however, as a number of federal circuits have deployed relaxed pleading standards for Rule 9(b) in certain circumstances. When the evidence of fraud is particularly in the control of the defendant, some courts have evaluated complaints with lesser scrutiny. In the First Circuit, courts have permitted relators to introduce statistical evidence to boost their pleadings past the threshold of acceptability rather than provide information of specific false claims. The Fifth Circuit has adopted a relaxed standard in cases that contemplate a complex fraud occurring over a large number of years, recognizing it would be burdensome to require a relator to provide detailed information on such a large volume of claims. The Ninth Circuit has similarly relaxed the pleading requirement. Relators in the Fourth Circuit need only to produce a representative sample of fraudulent claims in order for a qui tam suit to proceed to discovery. The Sixth, Eighth, and Eleventh Circuits also follow a similar standard.

E. Accounting Rule

The Restatement (Third) of the Law Governing Lawyers includes a number of provisions regarding an attorney’s use of...
confidential client information.205 One unique provision contained in the Restatement includes Section 60(2), which states “except as stated in [section] 62, a lawyer who uses confidential information of a client for the lawyer’s pecuniary gain other than in the practice of law must account to the client for any profits made.”206 The rule is primarily concerned with situations where a lawyer may unjustly enrich himself due to information he possesses about his client.207 Unlike the other rules pertaining to the attorney’s use of the client’s confidential information contained in the Restatement, the lawyer is prohibited from using confidential information of the client even if the use of such information would not risk prejudice to the client.208 Borrowing rules from the Restatement (Second) of Agency, the Restatement (Third) of the Law Governing Lawyers states that in situations where a lawyer has personally enriched himself from the impermissible use of confidential client information, the only proper remedy for the client is “restitutionary relief in the form of disgorgement of profit.”209

A lawyer may escape the clutches of the accounting language of section 60(2) in two circumstances. First, the lawyer may permissibly use confidential client information for the lawyer’s personal gain if the client consents to the use of the information.210 Second, a lawyer may use confidential client information from one client to assist in the representation of another client, so long as the result of such information sharing does not result in a material risk of harm to the original client.211 Such use is permitted even though it could result in a personal gain for the lawyer himself.212

Although the Restatement does not reflect binding law, a single state, Louisiana, has drawn parallels between the language in the Restatement and its own mandatory law.213 An attorney who uses confidential client information for his own benefit may be liable as

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206 Id. § 60(2).
207 Id. § 60(2) cmt. j.
208 Id.
209 Id. § 60(2) cmt. j.; Restatement (Second) of Agency § 388 cmt. c (Am. Law Inst. 1958).
210 Restatement (Third) of Law Governing Lawyers § 60(2) cmt. j (Am. Law Inst. 2000).
211 Id.
212 Id.
a fiduciary for a claim of misappropriation of confidential information.214 Furthermore, the Louisiana Civil Code provides that mandataries owe their principals everything they received by virtue of the mandate.215 This rule applies to anything unduly gained by the mandatary as well.216

F. Summary

Evidentiary rules and ethical requirements make life difficult for an attorney-relator. All relators, attorney or not, must plead their causes of action with sufficient particularity in order to survive a Rule 12(b)(6) Motion to Dismiss. Such a rule necessarily raises the difficulty of successfully pleading a complaint. Particularity becomes even more of a problem for the would-be attorney-relator, however, because the relator is prohibited from using a number of different sources of information due to either evidentiary or ethical rules.

In trying to plead a complaint with particularity, the attorney must make sure not to base her claim on any communication that took place between the attorney and client for the provision of legal services, as the attorney-client privilege would protect these communications. Additionally, any information gained during the course of the representation that either relates to the representation or could potentially lead to the discovery of information that relates to the representation, is also barred from disclosure by Rule 1.6. Unless otherwise permitted by the Model Rules, the attorney would also be prohibited from using information gained during the course of the representation to the disadvantage of a former client or revealing that information to others.

Assuming an attorney was able to craft a complaint with particularity that did not rely upon any communication for the provision of legal services or any information gained during the course of the representation or could lead to the discovery of information related to the representation, a qui tam suit would be able to move forward. However, in some jurisdictions, the attorney’s use of client information to personally enrich himself may be considered a violation of the attorney’s fiduciary duty to his client. Even if the qui tam suit were successful, the attorney would

216 Id.
need to account back to his client any money he gained from a qui
tam suit.

The Quest, Bury, and Doe III courts mentioned that attorneys
were included in the class of persons eligible to serve as relators in
qui tam suits. The analysis above, however, demonstrates just how
difficult serving as an attorney-relator can be. A more workable
solution may be to advocate for changes to state ethical rules to
allow for attorneys to disclose acts of fraud occurring within an
attorney’s organization. As the next section will detail, “loyal
disclosure rules” are particularly suited to cure the current
inconsistency between protecting the public coffers and the
relationship between an attorney and his client.217

V. LOYAL DISCLOSURE RULES – AN APPROPRIATE MIDDLE–GROUND

Loyal disclosure rules are designed to permit attorneys, in
certain circumstances, to reveal confidential information of their
client, an organization.218 The action is based in the belief that the
disclosure is necessary to protect the organization from the harmful
conduct of one of its members.219 Disclosure is justified because it
is in the interest of the client, the organization.220

The Securities and Exchange Commission (“SEC”) first
discussed loyal disclosure rules in response to the major financial
scandals.221 The ABA has debated its own rules regarding
confidentiality throughout the past century.222 In 1983, the ABA
adopted the Model Rules of Professional Conduct.223 These rules
affirmed the ABA’s stance of protecting client confidentiality.224

217 George C. Harris, Taking the Entity Theory Seriously: Lawyer Liability for Failure to
Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing, 11
GEO. J. LEGAL ETHICS 597, 599 (1998). A “loyal disclosure” is defined as “[a]
disclosure . . . justified not despite loyalty to the client but because it is in the client’s
interest.” Id.
218 MODEL RULES OF PROF’L CONDUCT r. 1.13(c) (AM. BAR ASS’N 2014).
219 Id.
220 Harris, supra note 217, at 599.
221 Paula Schaefer, Overcoming Noneconomic Barriers to Loyal Disclosure, 44 AM. BUS.
222 Id.
223 American Bar Association, Center for Professional Responsibility, Model Rules of
Professional Conduct, http://www.americanbar.org/groups/professional_responsibility/
224 American Bar Association adopted confidentiality rules that stated that an
attorney may only disclose confidential information of a client to protect a third party
from “imminent death or substantial bodily harm.” MODEL RULES OF PROF’L CONDUCT
r. 1.6 (AM. BAR ASS’N 2014).
In the wake of a number of highly publicized corporate scandals, the ABA created the Task Force on Corporate Responsibility. The purpose of the task force was to evaluate the legal and ethical considerations present in the corporate context. In the face of such widespread failures by a number of large corporate entities, the ABA wished to make recommendations to attorneys, business officers, and regulators on how to best handle issues of corporate governance.

The testimony largely emphasized that when an individual engages in conduct that injures an organization, attorneys owe a duty to their organization not to the organization members. The Task Force rejected the idea that organizations would keep their in-house counsel at arm's length for fear of reporting if the proposed rules were adopted. Organizational clients present a unique concern: the attorney may be forced to disclose information in order to prevent substantial injury to an organization based upon a constituent’s actions. The end result was the adoption of Rule 1.13.

A. State Loyal Disclosure Statutes

Twenty-eight states have adopted organizational client rules similar to the 2003 proposed amendments. In general, the rule charges lawyers with proceeding with whatever is reasonably

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226 Schaefer, supra note 221, at 429.
227 Schaefer, supra note 221, at 429–30.
228 Final Report, supra note 225, at 12.
230 Schaefer, supra note 221, at 430.
231 Schaefer, supra note 221, at 430-31.
232 ALASKA R.P.C. r. 1.13(c) (2009); ARIZ. R.P.C. r. 1.13 (2004); ARK. R.P.C. r. 1.13(c) (2016); COLO. R.P.C. r. 1.13(c) (2007); CONN. R.P.C. r. 1.13(c) (2016); GA. R.P.C. r. 1.13(c) (2001); HAW. R.P.C. r. 1.13(c) (2014); IDAHO R.P.C. r. 1.13(c) (2004); IL. R.P.C. r. 1.13(c) (2010); IND. R.P.C. r. 1.13 (2005); IOWA R.P.C. r. 32:1.13(c) (2013); KY. S.C.R. 3.130(1.13) (2009); LA. ST. Bar Ass’n Art. XVI § 1.13(c) (2016); MASS. R.P.C. r. 1.13(c) (2013); NEB. CT. R.P.C. § 3-501.1.13(c) (2008); NEV. R.P.C. r. 1.13(c) (2007); N.H. R.P.C. r. 1.13(c) (2008); N.M. R.P.C. r. 1.13(c) (2008); N.D. R.P.C. r. 1.13(c) (2006); OK. R.P.C. r. 1.13(c) (2007); OR. R.P.C. r. 1.13(c) (2015); RI. R.P.C. r. 1.13(c) (DATE); S.C. R.P.C. R. 1.15(c) (2015); UTAH R. R.P.C. r. 1.13(c) (2013); VT. R.P.C. r. 1.13(c) (2009); WASH. R.P.C. r. 1.13(c) (2006); W. VA. R.P.C. r. 1.13(c) (2015); WY. R.P.C. r. 1.13(c) (2014).
necessary to protect the organization.\footnote{\textit{Model Rules of Prof'l Conduct} r. 1.13(b) (Am. Bar Ass'n 2003).} When a lawyer knows that a member of the organization is “engaged in action, intends to act or refuses to act in a matter” that violates a legal obligation the member owes to the organization or will result in a legal violation that “could reasonably be imputed to the organization,” the loyal disclosure rule is implicated.\footnote{\textit{Id.}} In these circumstances, that lawyer is required to act as is reasonably necessary to protect the best interests of the organization.\footnote{\textit{Id.}} Rule 1.13(b) requires the lawyer to report the matter to a higher authority unless the lawyer reasonably believes it is not in the best interest of the organization.\footnote{\textit{Id.}} If the highest authority of the organization fails to remedy the situation, and the attorney reasonably believes the legal violation is reasonably certain to occur and will result in substantial injury to the organization, the attorney may disclose information regardless of whether Rule 1.6 would prohibit the disclosure.\footnote{\textit{Id.}}

Three states adopted loyal disclosure rules that are similar to the proposal that the ABA House of Delegates rejected in 1980.\footnote{MD. LAWYER'S R.P.C. r. 1.13(c) (2016); M.R.P.C. r. 1.13(c) (2016); N.J. R.P.C. r. 1.13(c) (1994).} The basic structure of these loyal disclosure rules is similar to Rule 113. Under these rules, loyal disclosures to individuals outside of the organization are only permitted when an attorney reasonably believes the organization’s highest authority has acted to further the personal or financial interests of members of that authority “which are in conflict with the interest of the organization,” and that the disclosure is necessary in the best interest of the organization.\footnote{MD. LAWYER'S R.P.C. r. 1.13(c) (1) & (2); M.R.P.C. r. 1.13(c)(1) & (2); N.J. R.P.C. r. 1.13(c)(1) & (2).}

Another variation in state loyal disclosure rules is the specific conduct recommended to attorneys by the rule. Using the New Jersey rule as an example, attorneys are advised to take a more global approach to problem solving when confronted with potential legal violations; lawyers are asked to consider the severity of the violation, the motivations of the involved parties, the consequences to the organization, and a host of other factors essential to making an informed decision.\footnote{N.J. R.P.C. r. 1.13(b).} The attorney has a duty to minimize both disruption to the organization and the risk that confidential
A number of actions that are available to attorneys are enumerated in the rule itself. Counsel could ask management to reconsider the matter. An attorney could also obtain the opinion of an outside counsel. Although it may be difficult, in-house counsel could also choose to report the matter to a higher authority if they do not find a receptive ear from lower level management.

B. Adoption of Loyal Disclosure Rules

i. Removing Rewards for Rogues: Providing an Ethical Out

Widespread adoption of loyal disclosure rules would provide an attorney with an alternative vehicle to the FCA to prevent and stop fraud from occurring at her organization. One of the most important changes this would bring is the removal of money as a motivation for action. It is important to remember the FCA’s genesis was the idea of using a “rogue to catch a rogue.” Quest Diagnostics stated dissatisfaction with Bibi for disclosing confidential information he acquired during the course of their relationship for his own personal gain.

In the context of the rules discussed previously, widespread adoption of Rule 1.13 would fix any problems with the Restatement § 60(2) or La. Civ. Code art. 3004. These rules only contemplate situations where an attorney personally enriches himself by using client information. Rule 1.13 does not provide any sort of award; the disclosure is made as a matter of ethics, not as a legal claim. Without any potential qui tam reward for serving as a relator, the whole question of whether an accounting is owed becomes irrelevant.

ii. Confidentiality Conundrum: Rules 1.6 and 1.9

In addition to removing financial incentives for attorneys, the widespread adoption of Rule 1.13 presents a solution to maneuvering around the broad confidentiality restrictions of Rule 1.6 and 1.9. As discussed previously, the amount of information protected by the duty of confidentiality is broad. Much of the

241 Id.
242 Id. r. 1.13(b)(1).
243 Id. r. 1.13(b)(2).
244 Id. r. 1.13(b)(3).
information an attorney would use for a qui tam suit would be information related to the representation of the organization or information that could lead to confidential information of the organization. The exceptions to Rule 1.6 currently do not provide attorneys with a workable solution either; the requirement that the organization’s agent uses the attorney’s services to further the fraud severely limits the number of scenarios in which an attorney could disclose the information.

Rule 1.13(c)(2) provides a better framework for dealing with the fraudulent activity of an organizational client. First, the rule permits disclosure regardless of whether Rule 1.6(b) would permit disclosure.\(^\text{246}\) This language is key in removing the “attorney’s services” hurdle. Second, Rule 1.13(c)(2) is also narrow enough in scope that attorneys will not engage in fishing expeditions to root out fraud. The rule limits disclosures to those situations where the attorney reasonably believes a substantial injury to the organization is reasonably certain to occur.\(^\text{247}\) Additionally, disclosure is permitted only to the extent an attorney reasonably believes it is necessary to prevent injury to the organization.\(^\text{248}\) With regard to Rule 1.9, the loyal disclosure rules do not provide much help. Although attorneys are permitted to both use information to the disadvantage of a former client and reveal information related to the representation when the use of the information would “otherwise be permitted by the rules,” the disclosure provisions of Rule 1.13 only apply to attorneys employed or retained by an organization.

iii. Privilege and Particularity

Rule 1.13 provides a solution to the particularity pleading problem by giving attorneys a way of avoiding the issue altogether. Loyal disclosure rules are an ethical obligation and not a cause of action. Therefore, attorneys are not required to submit a complaint to utilize them, nor are they required to provide a description of the fraudulent scheme in excruciating detail. In fact, Rule 1.13 places a duty upon attorneys to minimize the amount of confidential information that is disclosed. Such a provision effectively balances the confidentiality of the organization with the government’s interest in detecting and preventing fraud.

\(^{246}\) MODEL RULES OF PROF’L CONDUCT r. 1.6(b) (AM. BAR ASS’N 2014).

\(^{247}\) Id. r. 1.6(b)(2).

\(^{248}\) Id.
In contrast, privilege creates a more difficult problem. Although Rule 1.13 may permit disclosure if the requirements are met, the client would still retain the right to invoke the attorney–client privilege during any resulting proceeding. By raising the privilege as a shield, the organization would bar any communication between the organization’s constituents and the attorney for the provision of legal services from coming into evidence. Unlike the particularity requirement of Rule 9(b), the attorney–client privilege seems to be an immovable obstacle.

One important distinction between the attorney–client privilege and the other ethical and evidentiary rules discussed in this Note is the amount of information protected by the privilege. The attorney–client privilege may be strong, but it covers such a tiny amount of behavior that it hardly seems a qui tam suit would fail by the exclusion of that evidence alone. Model Rule 113(b) requires that a substantial injury to the organization be “likely” before an attorney is permitted to act.\textsuperscript{249} A single communication for the provision of legal services may prove to be insufficient for the attorney to believe an injury is “likely.” Additionally, the attorney–client privilege only protects the communication that took place between the attorney and client. The underlying facts relevant to that communication, facts that would most likely serve as evidence of fraud, would be fair game.

iv. Solitary Snag: The Problem of Individuals

The ethical mandate of Rule 1.13 provides attorney-relators who formerly represent organizational clients such as those discussed in Quest and Doe with the ability to take corrective action against fraud without relying upon the FCA. However, as the organization in question grows smaller, and the former client becomes less of a large corporation and more of an individual person, Rule 1.13 becomes less applicable.

The comments to Rule 1.13 state that an “organization” is a legal entity that is incapable of taking action on its own.\textsuperscript{250} Instead, officers, directors, employees, shareholders, other constituents, or their equivalents act on behalf of the organization.\textsuperscript{251} Unincorporated associations are also included under the purview of

\textsuperscript{249} Id. r. 1.13(b).
\textsuperscript{250} Id. r. 1.13 cmt. 1.
\textsuperscript{251} Id.
the rule.\textsuperscript{252} The language of the Rule itself considers a situation where a helpless legal entity has been hijacked by malfeasant managers looking to raid the federal treasury through some sketchy business practices. In these situations, the attorney would feel comfortable stepping in; after all, the attorney is actually saving a client (the organization) from an individual who is supposed to be acting on the client’s behalf. The advantage to Rule 1.13, as this hypothetical demonstrates, is the wrongdoer is not viewed as an individual whom the attorney owes ethical duties.

The rule analysis becomes trickier as the organization shrinks, however. Consider the closely held corporation. While there may technically be a legal distinction between the corporation and its owner, in reality, there is no distinction at all. For all intents and purposes, the corporation is the manager. In these circumstances, disclosure of wrongdoing under Rule 1.13 for the closely held corporation could lead to nonsensical results.

For example, consider a scenario where an attorney serving as counsel for a corporation, wholly owned by a single individual, finds the owner of said corporation is falsely billing the government. Under Rule 1.13(b), the attorney would have an obligation to report this wrongdoing to the shareholders of the corporation; in this case, the wrongdoer himself. If the attorney, recognizing the futility in reporting the fraudulent conduct to the “shareholder,” were to report “up and out” of the corporation and make a disclosure to the relevant enforcement authority, penalties would be levied against wrongdoer: the organization/shareholder.

Rule 1.13 is completely unavailable to attorney-relators in qui tam suits where the former client is an individual: no “organization” exists to trigger the application of the loyal disclosure rule. For these situations, Congress would be well-advised to prohibit attorneys from bringing qui tam actions against individuals they formerly represented. Although attorney-relators could chance navigating the maze of ethical and evidentiary rules discussed earlier, it may be in the best interest of the reputation of the legal profession to prohibit attorneys from trying to profit at the detriment of their former client by filing a suit under the FCA.

\textsuperscript{252} Model Rules of Prof’l Conduct r. 1.13 cmt. 1 (Am. Bar Ass’n 2003).
VI. Conclusion

The FCA remains one of the federal government’s most effective tools in the fight against fraud. Relators have been crucial to the statute’s success. By allowing private citizens of to file qui tam suits, the government has greatly increased its ability to root out and remedy fraud. Naturally, the greater the number of people that can serve as relators, the greater the amount of fraud the government will be able to detect. Limitations on who can serve as a relator therefore undermines the government’s important interest in fighting fraud. This Note has considered one type of relator, the attorney-relator, and how numerous ethical and evidentiary considerations effectively prohibit attorneys from filing qui tam suits against former clients. The widespread adoption of loyal disclosure rules would provide a number of key solutions to the problems faced by organizations and attorney-relators. Loyal disclosure rules are motivated by an ethical obligation, and not the promise of reward. By removing money from the equation, the attorney is immunized from any accounting claims brought by their former clients. Making disclosure an ethical duty also allows the attorney to prevent fraud without necessarily bringing a cause of action against a client. Because the problems an attorney faces with regard to the particularity requirement are obviated once the matter is taken out of the context of a civil action, this is a key advantage.

The most important advantage gained by loyal disclosure rules, however, is the ability to bypass the stringent confidentiality requirements of Rule 1.6. These requirements proved to be fatal to attorney-relators. The confidentiality rules block the greatest amount of client information and are laced with a number of specific requirements that effectively tie the hands of attorney-relators. Rule 1.13 permits attorneys to disclose confidential information despite being prohibited by Rule 1.6. Rule 1.13 provides attorneys with a number of options when the attorney finds a member of the organization is violating a legal duty. These options help attorneys protect their clients as well as help the government combat fraud.